Supreme Court, U.S.
FILED
051549 JUN 1 - 2006
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No.

IN THE

Supreme Court of the United States

LAWRENCE R. RAGARD, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID P. SHELDON
Barracks Row
512 8th Street, SE
Washington, DC 20002
202-546-9575

Attorney for Petitioner

QUESTION PRESENTED

Was the United States barred from prosecuting an accused at a general court martial if the accused has satisfied the terms of a pre-trial diversion agreement he made with the District of Columbia for an offense arising from the same conduct?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are Petitioner Lawrence R. Ragard, an individual, and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Lawrence R. Ragard respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Federal Circuit (Appendix A) is reported as *United States v. Ragard,* 439 F.3d 1378 (Fed. Cir. 2006). The memorandum opinion of the United States Court of Federal Claims (Appendix B) is not reported.

The Opinion of the United States Army Court of Criminal Appeals (Appendix C) is reported as *United States v. Ragard,* 56 M.J. 852 (CCA 2002). Petition for Grant of Review was denied by the Court of Appeals for the Armed Forces, *United States v. Ragard,* 57 M.J. 468 (CAAF 2002) (Appendix D), and a motion for reconsideration was subsequently denied, *United States v. Ragard,* 58 M.J. 130 (CAAF 2003) (Appendix E).

JURISDICTION

The Court of Appeals for the Federal Circuit entered the decision below on March 6, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This Petition is timely filed.

STATUTES INVOLVED

10 U.S.C. § 925
D.C. Code Ann. § 22-1312(a)

STATEMENT

On October 14, 1997, a United States Park Police officer arrested Petitioner in Rock Creek Park for engaging in lewd acts, in violation of D.C. Code § 22-1312(a). The Corporation Counsel for the District of Columbia charged Petitioner with indecent exposure, also a violation of D.C. Code § 22-1312(a). On October 30, 1997, Petitioner was arraigned in the Superior Court in the District of Columbia.

On November 3, 1997, Petitioner entered into a pre-trial diversion program that required him to perform forty hours of community service (the "Notice of Eligibility for Inclusion in the Pre-Trial Diversion Program" is attached as Appendix F). In consideration for his completion of forty hours of community service, the Government agreed not to prosecute Petitioner. On March 18, 1998, the Government dismissed the charge by *nolle prosequi*.

On December 19, 1997, the United States Army initiated court-martial proceedings against Petitioner for the same conduct. The accused was charged with violating Article 125, Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 925 (sodomy), Article 133, UCMJ, 10 U.S.C. § 933 (conduct unbecoming an officer), and Article 134, UCMJ, 10 U.S.C. § 933 (indecent acts). Prior to entry of pleas, the accused filed a Motion to Dismiss on the ground that he had satisfied the terms of a pretrial agreement made with prosecutors for the District of Columbia, which barred his prosecution by the United States. The military judge denied the motion.

Thereafter, the military judge convicted the Petitioner, in accordance with his plea, of sodomy, in violation of Article 125, UCMJ. The military judge entered

findings of not guilty to the charges of conduct unbecoming an officer and indecent acts. Those charges were dismissed.

On appeal, the United States Court of Criminal Appeals affirmed Petitioner's conviction, noting that the subsequent prosecution of the accused raised an issue of first impression. *United States v. Ragard,* 56 M.J. 852 (CCA 2005). Petitioner petitioned the United States Court of Appeals for the Armed Forces to review his case. That Court denied the Petition for Review. Senior Judge Eugene R. Sullivan dissented, noting that he would have granted review of issues raised by the subsequent prosecution of the accused. *United States v. Ragard,* 57 M.J. 468 (CAAF 2002), *recons. denied,* 58 M.J. 130 (CAAF 2003). Because the Court of Appeals for the Armed Forces did not grant the Petition for Review, Petitioner could not seek direct review in this Court. 10 U.S.C. § 867a; 28 U.S.C. § 1259(3).

On February 27, 2004, Petitioner filed an action under the Tucker Act in the United States Court of Federal Claims, asserting that he had been wrongfully prosecuted by the United States. In a memorandum opinion, the court dismissed Petitioner's complaint for lack of subject matter jurisdiction. Appendix B. On appeal, the United States Court of Appeals for the Federal Circuit affirmed the lower court's decision, finding that the subsequent prosecution of the accused by the Army was not barred by the pretrial diversion agreement. *United States v. Ragard,* 439 F.3d 1378 (Fed. Cir. 2006).

REASONS FOR GRANTING THE WRIT

Questions of court-martial jurisdiction have historically concerned this Honorable Court. *See, e.g., United States ex rel. Hirshberg v. Cooke,* 336 U.S. 210, 212 (1949); *Toth v. Quarles,* 350 U.S. 11 (1955); *Solorio v. United States,* 483 U.S. 435 (1987).[1] This case presents an important jurisdictional question of first impression for this Court: whether a pre-trial diversion agreement between the Petitioner, who was charged with criminal conduct under the laws of the District of Columbia, and prosecutors for the District of Columbia, barred the United States from subsequently prosecuting the Petitioner at a general court martial for an offense under the Uniform Code of Military Justice arising from the same conduct.

The Court of Appeals for the Federal Circuit held that the Corporation Counsel for the District of Columbia "had no authority in the diversion agreement to bind the Army not to court martial the Petitioner, and the agreement did not do so." *Ragard,* 439 F.3d at 1381. This statement creates a clear conflict with well-established precedents of this Court and with the holdings of other circuits below. Accordingly, the Court should grant the petition to review the questions presented.

A. The decision of the Court of Appeals for the Federal Circuit is in direct conflict with well-settled precedent of this Court establishing that the District of Columbia and the Department of the Army share the same jurisdiction – both owe their existence wholly to the United States.

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[1] *See also United States v. Grimley,* 137 U.S. 147 (1890); *Reid v. Covert,* 354 U.S. 1 (1957); *O'Callahan v. Parker,* 395 U.S. 258 (1969), *rev'd,* 483 U.S. 435 (1987); *Relford v. Commandant,* 401 U.S. 355 (1971).

It is well established that military and civilian courts within the federal judicial establishment enjoy concurrent jurisdiction to prosecute armed forces personnel for criminal wrongdoing. *See, e.g., United States v. Talbot,* 825 F.2d 991 at 997 (6th Cir. 1987). Concurrent jurisdiction "affords the pertinent authorities a choice of where to prosecute the offender, an election generally resolved by considerations of comity and relevant military and civilian interests." *Id.* It is also well settled that violations of the District of Columbia Code and violations of the United States Code are all crimes against a single sovereign, namely, the United States. *See, e.g., Goode v. Markley,* 603 F.2d 973 at 976 (D.C. Cir.1979), *cert. denied.* 444 U.S. 1083 (1980). All crimes prosecuted under the District of Columbia Code are maintained in the name of the United States. *Id.*

Furthermore, "the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government." *Grafton v. United States,* 206 U.S. 333 at 352 (1907).

In affirming the judgment of the Court of Federal Claims below, the Court of Appeals for the Federal Circuit rested its opinion on an attempt to distinguish the jurisdiction of the District of Columbia from that of the United States. "Although the District of Columbia is a federal entity, it is also an independent one," the Court wrote. "It has its own laws, its own government, and its own elected and appointed officials." *Ragard,* 439 F.3d at 1381.

"When the Assistant Corporation Counsel filed charges of indecent exposure against Ragard and then agreed in the diversion agreement to dismiss those charges if Ragard

performed specified community service, he was acting solely for the District of Columbia," the Court continued. "Only the District of Columbia, not the United States, was a party to and bound by that agreement." *Id.*

This is for all intent and purpose a distinction without a difference. To suggest, let alone rule, that the District of Columbia is an independent entity separate and distinct from the Federal government violates the Constitution. As this Court has noted,

> The government of the United States and the governments of the several states, in the exercise of their respective powers, move on different lines. The government of the United States has no power, except as expressly or by necessary implication has been granted to it, while the several states may exert such powers as are not inconsistent with the Constitution of the United States nor with a republican form of government, and which have not been surrendered by them to the general government.

Grafton, 206 U.S. at 354.

The Constitution grants to Congress the powers "[t]o make Rules for the Government and Regulation of the land and naval Forces," at Article II, cl. 14, and "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of Government of the United States . . . ." In this respect, the jurisdiction of the District of Columbia is identical to that of the United States territory of the Philippines when this Court, speaking through Justice Harlan in *Grafton*, wrote:

> An offense against the United States can only be punished under its authority and in the tribunals created by its laws; whereas, an offense against a state can be punished only by its authority and in its tribunals. The same act . . . may constitute two offenses, one against the United States and the other against a state. But these things cannot be predicated of (sic) the relations between the United States and the Philippines. The government of a state does not derive its powers from the United States, while the government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the Untied States. The jurisdiction and authority of the United States over that territory and its inhabitants, for all legitimate purposes of government, is paramount. So that the cases holding that the same acts committed in a state of the Union may constitute an offense against the United States and also a distinct offense against the state do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government, -- that of the United States.

Grafton, 206 U.S. at 354.

By extension to the District of Columbia, the *Grafton* case makes clear that the Court of Appeals for the Federal Circuit erred in its attempt to differentiate the jurisdiction of the District of Columbia from that of the United States for purposes of the Petitioner's criminal prosecution. Here, as in *Grafton*, the two tribunals in which charges were brought against the accused – the District of Columbia Superior Court and a court martial of the United States Army – "exert all their powers under and by the authority of the same government, - that of the United States."

When the Assistant Corporation Counsel filed charges of indecent exposure against Petitioner and then agreed in the pre-trial diversion agreement to dismiss those charges if Petitioner performed specified community service, he may have been acting "for the District of Columbia pursuant to . . . statutory authority," as the Court of Appeals below noted in its Opinion. But like the territorial government of the Philippines in *Grafton*, the government of the District of Columbia owes its existence wholly to the United States. Under the precedent of *Grafton*, it cannot be said that the Assistant Corporation Counsel was acting "solely for the District of Columbia," when the District of Columbia itself owes its existence wholly to the United States. The subsequent prosecution of the Accused conflicts with this Court's decision in *Grafton*. The Court should grant the certiorari petition. Rule 10(c).

B. The decision of the Court of Appeals for the Federal Circuit creates a clear split with other circuits that have held that plea agreements negotiated by agents of the federal Government are binding on the United States as a whole.

The decision of United States Court of Appeals for the Federal Circuit is squarely at odds with opinions rendered in other Circuits that have held that "it is the Government at large - not just specific United States Attorneys or United States '*Districts*' – that is bound by plea agreements negotiated by agents of Government." *United States v. Harvey*, 791 F.2d 294, 303 (4th Cir.1986) (*emphasis in original*). The United States Court of Appeals for the Fourth Circuit in *Harvey*, citing to *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972), continued:

> Of course, the Government may – and quite readily can – "agree" through its agents that only certain of

> its agents are to be obligated in particular respects, or that the Government's obligation is limited territorially or temporally, or that the Government's obligation is otherwise qualified. But the mere fact that a particular agent, holding office in a particular district, and for a limited term of office makes "the agreement" – "agrees" – does not impose those limitations. In sum, under that settled circuit law, the proper way for plea agreements to express such limitations is as limitations on the Government's general obligation – a thing quite easily done – and not by technically inaccurate identifications of particular agents or agencies of Government as *the* contracting party.

Harvey, 791 F.2d at 303 (*emphasis in original*).

The United States Court of Appeals for the Eighth Circuit has similarly held that an Assistant United States Attorney enters into a plea agreement on behalf of the United States government as a whole. *Margalli-Olivera v. I.N.S.*, 43 F.3d 345 (8th Cir. 1994). In that case, where a plea agreement was at issue, the Eighth Circuit held that the U.S. Attorney had actual authority to bind the Immigration and Naturalization Service under agency principles. *Id.* at 354. The court further stated that "an Assistant United States Attorney enters into a plea agreement on behalf of the United States government as a whole. Accordingly, promises made by an Assistant United States Attorney bind all agents of the United States government. Therefore, we hold that unless a plea bargain uses specific language that limits the agents bound by the promise, ambiguities regarding the agencies bound by the agreement are to be interpreted to bind the agency at issue." *Margalli-Olivera*, 43 F.3d at 353. *See also United States v. Van Thournout*, 100 F.3d 590, 594-95, (8th

Cir. 1996), *Thomas v. I.N.S.*, 35 F.3d 1332, 1338-41 (9th Cir. 1994).

The question of whether a pretrial diversion agreement operates to bind the federal government and its various agencies, including the Department of the Army, appears to be one of first impression in the federal circuits. However, the principles of law and the reasoning employed by the courts in the context of plea agreements are equally applicable to pretrial diversion agreements, as both are established alternatives to trial in the criminal justice process, both are governed by principles of contract law, and both raise due process concerns.

The decision of the Court of Appeals for the Federal Circuit conflicts with holdings of the Fourth and Eighth Circuits—namely that an agent of the United States who agrees to a pretrial agreement binds all other agencies of the same sovereign in the same manner. This Court should grant this petition to resolve the conflict between the Court of Appeals for the Federal Circuit's opinion in this case and opinions of the Fourth and Eighth Circuits. Rule 10(a).

As the United States Court of Criminal Appeals noted, the questions presented in this certiorari petition are ones of first impression:

> The issues raised by the appellant and the facts of this case present questions of first impression for this court. There are no military cases that speak directly to the ultimate issues at hand. Similarly, there are no other federal or District of Columbia decisions that provide definitive answers.

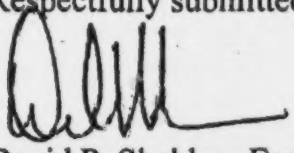
Ragard, 56 M.J. at 854.

Therefore, the issues raised in this certiorari petition are important questions of federal law that have not yet been settled, but should be. Good cause is shown to grant the petition. Rule 10 (c).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



David P. Sheldon, Esq.
Law Offices of David P. Sheldon, LLC
Barracks Row
512 8th Street, S.E.
Washington, DC 20003
Tel: 202-546-9575
Fax: 202-546-0135